No. 21,743

In the United States Court of Appeals for the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

LOCAL UNION NO. 38, UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPE FITTING INDUSTRY OF THE UNITED STATES AND CANADA, AFL-CIO, RESPONDENT

On Petition for Enforcement of an Order of the National Labor Relations Board

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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AUTHORITIES CITED

Cases:

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JURISDICTION

This case is before the Court upon the petition of the National Labor Relations Board for enforcement of its order issued against the respondent on June 15, 1966, pursuant to Section 10(c) of the National Labor Relations Act (61 Stat. 136, 73 Stat. 519, 29

U.S.C. Sec. 151, *et seq.*).[1] The Board's decision and order (R. 13-28)[2] are reported at 159 NLRB No. 36. This Court has jurisdiction of the proceeding, the unfair labor practices having occurred in San Francisco, California.

STATEMENT OF THE CASE

I. The Board's Findings of Fact

Briefly, the Board found that Local 38 (hereafter the Union) caused D. I. Chadbourne (hereafter the Company) to discharge Phillip Havill because of his non-membership in the Union in violation of Section 8(b)(2) and (1)(A) of the Act. The facts upon which the Board's findings rest are set forth below.

The Union and the Company were parties to a collective bargaining agreement in effect at all times material here (G.C. Exh. 7). Article II, Section 2 thereof required the Company to fulfill its need for qualified plumbers and pipefitters by calling the Union. However, the agreement also provided (Art. II. Section 7) that "If, but only if, the Union is unable to furnish qualified workmen within 48 hours after an employer calls for them, the employer shall be free to

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[1] The pertinent statutory provisions are reprinted, *infra*, pp. 13-15.

[2] References to the pleadings reproduced as "Volume I, Pleadings" are designated "R." References to the stenographic transcript of the hearing reproduced pursuant to Court Rule 10 are designated "Tr." References to the General Counsel's exhibits are designated "G.C. Exh." References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

procure the workmen from any other source or sources . . . ."

In July of 1964[3] Daniel Chadbourne, Company president, called Robert Costello, Union business representative and dispatcher at the hiring hall, requesting a "jobbing plumber and steamfitter that knows something about hot water and steam boilers" (R. 14; Tr. 26-27, 366-368). Thereafter on July 27, the Union dispatched William Guse. Although Guse proved unable to perform the type of work specified, he was kept on in another capacity (R. 14; Tr. 28). Subsequently Chadbourne renewed his request and the Union dispatched Harold Stone (R. 14; Tr. 28-29). Stone also proved to be unqualified (R. 14; Tr. 30-31). At this time, Chadbourne learned that one of his own employees, Phillip Havill, had extensive prior experience with boilers[4] (R. 14-15; Tr. 34, 36). Accordingly, the job was offered to Havill and accepted (R. 15; Tr. 109).

On August 31, acting on instructions from Chadbourne, Havill went to the hiring hall to register with the Union as required by the Agreement (R. 15; Tr. 110; G.C. Exh. 7, p. 11). Havill was not a member of the Union, nor was he registered on its out-of-work list (R. 15; Tr. 49). His initial efforts to register were unsuccessful as the dispatch office was

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[3] All dates hereafter are 1964 unless otherwise stated.

[4] Havill had been employed at non-unit work for the Company since 1963 (R. 15, n. 4; Tr. 33). Prior to his employment with the Company, he had held a variety of jobs involving boilers (Tr. 101-106).

closed. On the following day, Havill telephoned Costello to inform him that he had been hired by the Company and wanted to register (R. 15; Tr. 111). Costello inquired as to where he had worked before. Havill started to reply but Costello interrupted, asking "which locals did you work out of?" (R. 15, 20; Tr. 111). Havill replied that he had worked out of "different locals," but Costello again interrupted to ask "what plumbing and pipefitting locals?" Havill admitted, "None" (*Id.*). Costello responded, "you are not going to work. * * * You are not qualified and you haven't served an apprenticeship" (R. 15; Tr. 111). Havill was then directed to inform Chadbourne that if the latter wanted men the Union had "men sitting on the bench" (R. 15-16; Tr. 112). Havill responded that he was going to work the next day; Costello replied, "You are like Hell" (R. 16; Tr. 112).

Upon the conclusion of his talk with Havill, Costello called Chadbourne to complain about the latter's intention to hire Havill. Costello characterized Havill as a "non-union man" and threatened to "put a picket line down in front of your shop" (R. 16; Tr. 38). Chadbourne noted that the Union had been unable to furnish a qualified boiler man (Tr. 38-39). After hanging up, Chadbourne decided to use the hiring hall again as he couldn't "afford any trouble" (R. 16; Tr. 112).

Thereafter, two more applicants were dispatched by the Union to be interviewed for the job (R. 16; Tr. 32-33, 95-96). The first, Jack Baker, admitted that he had not worked on boilers for 20 years and wanted to learn that phase of the trade; the second applicant,

R. W. Unger, conceded he had no experience in servicing boilers (R. 16; Tr. 33, 62, 64-65). Neither man was hired. This was, in Chadbourne's words, "the straw that broke the camel's back," and on September 3 he told Havill to start work the next day (R. 16; Tr. 64-65).

On September 3, Chadbourne wrote the Union, pointing out that the Union had failed to provide a qualified boiler man and informing the Union that Chadbourne had hired Phillip Havill in accordance with Article II, Section 7 of the Agreement (R. 16-17; G.C. Exh. 2). The Union replied by letter, serving notice on Chadbourne that he had "violated our Agreement," and asking that he immediately correct this situation and get rid of all non-Union men in your employ" (R. 17; G.C. Exh. 3). A meeting ensued on September 29 between Chadbourne, Costello, and Mazzola, the Union's business manager. At that time, Mazzola repeated his demand that Havill be fired, insisting that the hiring was in violation of the Agreement and further expressing his opposition to Havill because the latter was "non-union" and the employment of "non-union help" would encourage other employees to follow Chadbourne's example (R. 17-18; Tr. 44-48). Mazzola also protested that "they had 50 men sitting on the bench and that he had plenty of experienced men to do the job" (R. 18; Tr. 44-45). Chadbourne repeated his statement that he had been unable to secure qualified workmen from the Union and maintained that the hiring of Havill was proper under Article II, Section 7 of the Agreement

(R. 18; Tr. 45). A second meeting followed a week later at which various alternatives were discussed without success (R. 18-19; Tr. 49-50). The parties remained adamant.

On October 22, the Union, in a letter drafted by its attorney, repeated its demand that Chadbourne discharge Havill (R. 19; Tr. 393; G.C. Exh. 5). A few days later, Chadbourne complied. He also wrote the Union that he had discharged Havill in compliance with the Union's demands but maintained that he had not violated the hiring procedure of the Agreement and was acting in order to avoid trouble (R. 19-20; G.C. Exh. 6). Thereafter Havill filed the instant charge with the Board's Regional Office alleging that the Union had unlawfully caused his discharge.

II. The Board's Conclusions and Order

On these facts, the Board, in agreement with the Trial Examiner, found that the Union had violated Section 8(b)(2) and (1)(A) of the Act by causing the Company to discharge Phillip Havill because of his non-membership in the Union (R. 22).

The Board's Order (R. 25-27) requires the Union to cease and desist from causing or attempting to cause the Company to discriminate against Phillip Havill or other employees in violation of Section 8(a)(3) of the Act by causing or attempting to cause the Company to discharge them because of their non-membership in the Union, or in any like or related manner restraining or coercing employees of the Company in the exercise of their Section 7 rights. Af-

firmatively, the Union is required to make Havill whole for any loss of pay suffered by reason of the discrimination and to notify the Company and Phillip Havill that it has no objections to Havill's employment and request that the Company offer him reinstatement to his former or a substantially equivalent position. Finally, the Union is required to post the customary notice.

ARGUMENT

Substantial Evidence on the Record Considered as a Whole Supports the Board's Finding That the Union Caused the Discharge of Employee Phillip Havill Because He Was Not a Union Member, in Violation of Section 8(b)(2) and (1)(A) of the Act

Section 8(b)(2) of the Act forbids a union "to cause or attempt to cause an employer to discriminate against an employee in violation of subsection [8](a)(3) . . . ." In the instant case, it is undisputed that the Union caused the discharge of Phillip Havill. Accordingly, if the Union was motivated in its conduct by Havill's lack of union membership, a clear statutory violation is established. *Radio Officers' Union* v. *N.L.R.B.*, 347 U.S. 17, 40-42; *N.L.R.B.* v. *Local 776, IATSE (Film Editors)*, 303 F. 2d 513 (C.A. 9), cert. denied, 371 U.S. 826; *Pacific Plywood Co.* v. *N.L.R.B.*, 315 F. 2d 671, (C.A. 9) enf'g *per curiam*, 134 NLRB 736; *N.L.R.B.* v. *(Local 369), IBEW*, 341 F. 2d 470 (C.A. 6); *Local Union No. 742, United Brotherhood of Carpenters and Joiners* v. *N.L.R.B.*, 64 LRRM 2598 (C.A. D.C.), decided March 16, 1967.

The Board found that the "real reason" for the Union's conduct was Havill's lack of union membership.

In so finding, the Board rejected the Union's contention that it sought the discharge of Havill solely because he had been hired in violation of the collective bargaining agreement. The question now before this Court is whether substantial evidence supports the Board's conclusion. It is thus immaterial that the Court might have decided differently if the case had been before it *de novo*. *Universal Camera Corp.* v. *N.L.R.B.*, 340 U.S. 474, 488; *N.L.R.B.* v. *U.S. Divers Company*, 308 F. 2d 899, 905 (C.A. 9). We submit that the Board, as we now show, was amply justified in holding that the Union was motivated to seek Havill's discharge by [his] lack of union membership and not by any breach of the Agreement.

Thus, as set forth in the Statement, p. 4, when Havill called the Union to register, as required by the collective bargaining agreement, Costello asked him what "locals," *i.e.* what "plumbing and pipefitting locals" he had worked out of. Havill answered, "None." Costello then asserted in no uncertain terms, "you are not going to work, you are not qualified and you haven't served an apprenticeship" [5] (R. 15; Tr. 111). Costello also told Havill to inform the Company that the Union had "men sitting on the bench" (R. 15-16; Tr. 112). When Costello called

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[5] It is clear that the Union was not interested in Havill's "ability" to do the job. Thus, when Havill attempted to relate his past employment record, he was interrupted and questioned as to what locals he had worked out of (R. 15; Tr. 111). Furthermore, at the hearing, the Union maintained that Havill's "qualifications to perform the work in dispute are not at issue here" (Tr. 102). In any event the record is clear that Havill was qualified (Tr. 102-105).

Chadbourne he characterized Havill as a "non-union man," and threatened to picket if he were not fired.[6]

Then, in answering Chadbourne's letter explaining why he rehired Havill, respondent demanded that Chabourne "get rid of all non-Union men in your employ." And when Chadbourne met with Mazzola and Costello, they objected to Havill because he was "non-union" and the employment of non-union help would encourage other employees "to do what Chadbourne did" [7] (R. 17-18; Tr. 44-48).

The Union contended before the Board that it sought the discharge of Havill solely because the Company hired him in violation of the collective bargaining agreement. This contention, as the Trial Examiner found (R. 20) is at odds with the express terms of the Agreement, wherein the parties clearly recognize the right of an employer to hire personnel without going through the hiring hall in certain circumstances. Thus, Article II, Section 7 specifically provides that "if the Union is unable to furnish qualified

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[6] Costello denied in part Havill's version of this conversation but was not credited by the Trial Examiner (R. 16, n. 9). It is settled law that credibility resolutions are matters for determination by the trier of fact which, if reasonable, will not be disturbed upon review. *N.L.R.B.* v. *Local 776, IATSE (Film Editors)*, 303 F. 2d 513, 518 (C.A. 9), cert. denied, 371 U.S. 826; *Shattuck Denn Mining Corp.* v. *N.L.R.B.*, 362 F. 2d 466, 469, (C.A. 9), and cases cited n. 10 thereat.

[7] Mazzola denied making any reference to Havill's "non-union" status (R. 18, n. 12). But, as the Examiner pointed out, this was the same phrase Mazzola used in his letter of September 22 (G.C. Exh. 3). In any event the Examiner credited Chadbourne (R. 18, n. 12). See cases cited, *supra*, n. 6, p. 9.

workmen within 48 hours after an employer calls for them, the employer shall be free to procure the workmen from any other source or sources" [8] (G.C. Exh. 7, p. 11). It is undisputed that over a period of several weeks the Company sought and the Union was unable to furnish a qualified applicant for the job. *Supra*, p. 3-5. Indeed, the Union objected to Chadbourne's hiring Havill even after it had dispatched two men upon Chadbourne's request, one of whom had not worked on boilers for 20 years and wanted to learn about them, and the other utterly inexperienced in servicing boilers. The contract apparently provides that an employer may hire outside the hiring hall in these circumstances. If respondent thought otherwise, it could have submitted its claim to the Joint Hiring Committee established by the Agreement for the express purpose of hearing "disputes or grievances arising out of the operation of the job referral system . . . ." (G.C. Exh. 7, p. 12). Indeed, the failure of the Union to do that strengthens the Board's conclusion—drawn from other evidence—that respondent was illegally motivated in causing Havill's discharge. See, *Shattuck Denn Mining Corp.* v. *N.L.R.B.*, 362 F. 2d 466, 469 (C.A. 9); *N.L.R.B.* v. *Dant*, 207 F. 2d 165, 167 (C.A. 9); *N.L.R.B.* v. *Griggs Equip., Inc.*, 307 F. 2d 275, 278 (C.A. 5).

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[8] Specifically, the Union argued that the above provision should be construed to permit the Union to refer all men it deemed qualified for the job without regard to the length of time this would require the employer to wait before he could turn to "other sources." The interpretation thus suggested would render the 48-hour provision virtually meaningless.

And even if one reason for the Union's insistence that Chadbourne be fired was its belief that the Company had violated the contract, the record makes plain that another reason was Havill's non-membership. Since one reason respondent sought Havill's discharge was unlawful, the Board could find a violation even if respondent had other, legitimate grounds for its action. *N.L.R.B.* v. *Tonkin Corp.*, 352 F. 2d 509 (C.A. 9); *N.L.R.B.* v. *Whitin Machine Works*, 204 F. 2d 883, 885 (C.A. 1); *N.L.R.B.* v. *West Side Carpet Cleaning Co.*, 329 F. 2d 758, 761 (C.A. 6), *Cf. N.L.R.B.* v. *Security Plating Co., Inc.*, 356 F. 2d 725, 728 (C.A. 9); *N.L.R.B.* v. *Texas Independent Oil Co.*, 232 F. 2d 447, 450 (C.A. 9).

In sum, we submit that the evidence amply supports the Board's finding that the Union violated Section 8(b)(2) and (1)(A) of the Act by causing the discharge of Havill because of his nonmembership in the Union.

CONCLUSION

For the reasons stated, it is respectfully submitted that a decree should issue enforcing the Board's order in full.

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June 1967.

CERTIFICATE

The undersigned certifies that he had examined the provisions of Rules 18, 19 and 39 of this Court, and in his opinion the tendered brief conforms to all requirements.

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Assistant General Counsel
National Labor Relations Board

APPENDIX A

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Secs. 151, *et seq.*) are as follows:

RIGHTS OF EMPLOYEES

Section 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities. * * *.

UNFAIR LABOR PRACTICES

Sec. 8(a) It shall be an unfair labor practice for an employer—

* * * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization * * *.

(b) It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7: *Provided*, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; * * *

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a) (3) or to discriminate against

an employee with respect to whom membership, in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership.

* * * *

PREVENTION OF UNFAIR LABOR PRACTICES

Sec. 10(c) * * * If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice and to take such affirmative action including reinstatement of employees with or without backpay, as will effectuate the policies of this Act: * * *

* * * *

(e) The Board shall have power to petition any court of appeals of the United States, . . . within any circuit . . . wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have the power to grant such temporary relief or restraining order as it deems just and proper,

and to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record . . . . Upon the filing of the record with it, the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the . . . Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

APPENDIX B

Pursuant to Rule 18 (2)(f) of the Rules of the Court

Exhibits in Board Case No. 20-CB-1297 (page references are to the numbered pages of the transcript).

GENERAL COUNSEL'S EXHIBITS

No.	Identified	Offered	Received in Evidence
1(a)-1(p)	7	7	7
2-6	12	13	13
7	15	15	15
8	21	22	22
9	22	(not offered)	
10	142	142	143
11	143	143	144
12	145	149	150
13(a-b)	233	233	233
14	237	237	237
15(a-b)	240	241	242
16	240	241	242
17	274	274	274
18(a-b)	279	279	280
19	287	287	288
20	290	291	291
21	296	296	297
22	308	308	308
23	399	399	401
24	387	387	387

RESPONDENT'S EXHIBITS

1	82	83	83

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